Mohammad Idres s/o Mohd Sulaiman Shah v Malayan Banking Bhd

HIGH COURT (KOTA BAHRU) — BANKRUPTCY NO 29–810 OF 1997
MUHAMMAD KAMIL J
5 SEPTEMBER 2000

Bankruptcy *— Practice and procedure — Notice to show cause — Summons simpliciter without Form 16, whether constitute notice within r 117 of the Bankruptcy Rules 1969*

Civil Procedure *— Preliminary objection — Waiver of — Exchange of affidavits between parties indicated waiver of rights to raise preliminary objections — Appellant taken by surprise — Whether preliminary objection should be allowed*

The respondent gave a loan to the appellant's wife to enable her to purchase a piece of land ('the land') and build a house thereon. The land was charged to the respondent as security for loan, and the appellant stood as guarantor thereto. The appellant's wife defaulted in her payment and the respondent foreclosed and sold the land by public auction. Later, the respondent obtained a judgment against the appellant's wife, and thereafter she was adjudged a bankrupt. Thereafter, a bankruptcy notice was served upon the appellant, followed by a bankruptcy petition about six months later. Being illiterate, the appellant sought the services of a counsel who filed a summons in chambers dated 23 May 1998, challenging the bankruptcy notice and the petition on the ground that the proceeds from the sale of the land had not been accounted for, and therefore the judgment debt had not been quantified at the time the bankruptcy notice was served on him. Thereafter, there was an exchange of affidavits between the parties, and the appellant filed a summons in chambers ('encl 9') against the respondent. The respondent on 20 March 2000, filed a preliminary objection to dismiss the appellant's summons (encl 9) under s 3(2) of the Bankruptcy Act 1967 ('the Act') and r 117 of the Bankruptcy Rules 1969 ('the rules'). At the hearing on 26 June 2000, the deputy registrar upheld the respondent's objection. The appellant appealed to this court submitting that there was no indication by the respondent that it would raise a perliminary objection under s 3(2) of the Act and r 117 of the rules, thus the appellant was taken by surprise by that application. The appellant also submitted that the respondent was deemed to have waived its right from the beginning and was therefore precluded from raising an objection now.

Held, allowing the appeal with costs:

(1) The notice that is required under r 117 of the rules is a notice in Form 16. This provision is mandatory and therefore a failure to abide by the rule cannot be taken as a mere irregularity that can be cured. The summons (encl 9) simpliciter, without Form 16 does not constitute a notice within the meaning of r 117 of the rules (see p 115B–D).

(2) Even if the summons (encl 9) were filed together with Form 16, the preliminary objection of the respondent would still be unsustainable. The respondent had waived its right. It is inequitable for the respondent to insist on its right when at the first instant the respondent had acted, by the exchange of affidavits with the appellant, in a manner which indicated that he had waived his right (see p 115D–E).

(3) The appellant had believed and acted in the knowledge that the respondent had, by its conduct, waived its rights. So, when the respondent filed his preliminary objection, he was precluded by the doctrine of waiver, as he cannot approbate and reprobate at the same time (see p 116F).

[Bahasa Malaysia summary

Responden telah memberikan satu pinjaman kepada isteri perayu untuk membolehkannya membeli sebidang tanah ('tanah tersebut') dan membina sebuah rumah di atasnya. Tanah tersebut digadaikan kepada responden sebagai cagaran pinjaman, dan perayu bertindak sebagai penggerenti. Isteri perayu mungkir bayar dan responden melelong dan menjual tanah tersebut melalui lelongan awam. Selepas itu, responden mendapat penghakiman terhadap isteri perayu, dan berikutan itu dia dihukum bankrap. Selepas itu, satu notis kebankrapan disampaikan kepada perayu, diikuti dengan satu petisyen kebankrapan kira-kira enam bulan kemudiannya. Oleh kerana buta huruf, perayu meminta khidmat seorang peguam yang memfailkan saman dalam kamar bertarikh 23 Mei 1998, mencabar notis kebankrapan dan petisyen tersebut dengan hujahan bahawa hasil jualan tanah tersebut belum dijelaskan, dan oleh itu, hutang penghakiman belum dinyatakan kuantitinya pada waktu notis kebankrapan disampaikan kepadanya. Selepas itu, terdapat pertukaran afidavit di antara kedua pihak, dan perayu memfailkan satu saman dalam kamar ('kandungan 9') menentang responden. Responden pada 20 Mac 2000 memfailkan satu bantahan permulaan untuk menolak saman perayu (kandungan 9) di bawah s 3(2) Akta Kebankrapan 1967 ('Akta tersebut') dan k 117 Kaedah-Kaedah Kebankrapan 1969 ('kaedah-kaedah tersebut'). Ketika pembicaraan pada 26 Jun 2000, timbalan pendaftar membenarkan bantahan responden. Perayu merayu kepada mahkamah ini dan berhujah bahawa tiada tanda oleh responden yang menunjukkan bahawa ia akan membangkitkan satu bantahan permulaan di bawah s 3(2) Akta tersebut dan k 117 kaedah-kaedah tersebut, oleh itu perayu terkejut dengan permohonan tersebut. Perayu juga berhujah bahawa responden telah disifatkan mengenepikan haknya daripada awal lagi dan oleh itu dikecualikan daripada membangkitkan bantahan sekarang.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Notis yang diperlukan di bawah k 117 kaedah-kaedah tersebut ialah notis di dalam Borang 16. Peruntukan ini mandatori dan kegagalan menurut peraturan ini tidak boleh diterima sebagai hanya satu perkara luar aturan yang boleh dipulihkan. Saman tersebut (kandungan 9) adalah ringkas, tanpa Borang 16, dan tidak membentuk notis dalam maksud k 117 kaedah-kaedah tersebut (lihat ms 115B–D).

(2) Jika saman tersebut (kandungan 9) difailkan bersama Borang 16 pun, bantahan permulaan responden masih tidak boleh dibenarkan. Responden telah mengenepikan haknya. Adalah tidak adil bagi responden berkeras hendak akan haknya sedangkan responden mula-mula bertindak, dengan pertukaran afidavit dengan perayu, dengan cara yang menunjukkan bahawa dia telah mengenepikan haknya (lihat ms 115D–E).

(3) Perayu telah percaya dan bertindak dengan pengetahuan bahawa responden telah, melalui kelakuannya, mengenepikan haknya. Oleh itu, apabila responden memfailkan bantahan permulaannya, beliau dikecualikan oleh doktrin penepian (waiver), kerana dia tidak boleh aprobat dan reprobat pada masa yang sama (lihat ms 116F).]

Notes

For cases on practice and procedure in bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1924–1961.

For cases on preliminary objection generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3819–3828.

Cases referred to

Binariang Communications Sdn Bhd v I & P Inderawasih Jaya Sdn Bhd [2000] 3 MLJ 321 (refd)

Crane v Colonial Mutual Fire Insurance [1920] 1 CLR 305 (refd)

Development & Commercial Bank Bhd v Datuk Kian Seng @ Ong Kim Cheang [1995] 3 CLJ 307 (refd)

Earl of Darnley v (Proprietors) of London, Chatham & Dover Railway (1867) LR 2 HL 43 (refd)

Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 663 (refd)

WJ Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 All ER 127 (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(2)

Bankruptcy Rules 1969 r 117

P Dorairaj (*P Dorairaj & Co*) for the appellant.

Wan Mohd Zuhdi bin Wan Abdullah (*Rithaudeen & Aziz*) for the respondent.

Muhammad Kamil J. : This is an appeal against the decision of the learned deputy registrar in upholding the respondent's preliminary objection under s 3(2) of the Bankruptcy Act 1967 and r 117 of the Rules thereunder, raised by the respondent at the hearing on 17 July 2000.

The judgment creditor ('the respondent') gave a loan of RM96,000 to the appellant's wife ('the chargee') to enable her to purchase a piece of land and build a house thereon. The land was charged to the respondent as security for the loan, and the appellant stood as a guarantor thereto. The chargee defaulted in her payment, the respondent bank foreclosed, and sold the land (by public auction) for RM41,500 on 13 January 1993. Later on 5 July 1974, the respondent obtained a judgment in a sum of RM157,870.75 against the chargee, and thereafter she was adjudged a bankrupt on 14 May 1997.

Later a bankruptcy notice (encl 1) was served upon the appellant on 13 December 1997, followed by a bankruptcy petition (encl 3) dated 12 May 1998, about six months later. The appellant, being an illiterate person, obtained the services of a counsel, who filed a summons in chambers dated 23 May 1998 (encl 9) challenging the bankruptcy notice and the petition on the ground that the proceeds from the sale of land had not been accounted for and therefore the judgment debt had not been quantified at the time of the service of the bankruptcy notice on him. There was an exchange of affidavits between the parties, and finally the appellant filed this summons against the respondent. On 20 March 2000, the respondent filed a preliminary objection under s 3(2) of the Act and r 117 of the Rules to dismiss the appellant's application (encl 9).

At the hearing on 26 June 2000, the deputy registrar upheld the objection on the ground that the summons in chambers was filed in less than the three day limit as prescribed by r 117.

Meanwhile, the appellant had, on 26 June 2000, filed the notice on form 16 as required under r 117, which, after a series of postponements in the requests of both sides, was finally fixed for hearing on 10 September 2000. These facts are not disputed.

Learned counsel for the appellant submitted that as there was no indication by the respondent that it would raise a preliminary objection under s 3(2) and r 117 earlier, the appellant was taken by surprise by that application. The respondent was deemed to have waived its right from the beginning, and therefore he was precluded from raising it now.

In a very recent Court of Appeal case of *Binariang Communications Sdn Bhd v I & P Inderawasih Jaya Sdn Bhd* [2000] 3 MLJ 321, the court held (at p 325D) that:

> For starters, I need to point out that the procedural point was never argued in the court below and on this omission alone, an appellate court is not bound to hear the appellant on their objection, unless due notice had been given and the respondent placed no strong objection to it being raised for the first time.

In the instant case, the appellant took a strong objection to the respondent's preliminary objection raised without notice at this appeal. On this point alone the court was not bound to hear the respondent's objection.

Assuming that the preliminary objection is in order, r 117 of the Bankruptcy Rules 1969 prescribed the time limit for filing a notice. Rule 117 states:

> Where a debtor intends to show cause against a petitioner he shall file a notice with the registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known, a copy of the notice three days before the day on which the petition is to be heard.

The notice that is required under r 117 is a notice in form 16. This provision is mandatory and therefore a failure to abide by the rule cannot be taken as a mere irregularity that can be cured. See *Development & Commercial Bank Bhd v Datuk Ong Kian Seng @ Ong Kim Cheang* [1995] 2 MLJ 724 (FC).

It is clear that the notice in form 16 was filed on 26 June 2000 and the petition was fixed for hearing on 10 September 2000, therefore it satisfies r 117. I do not think it is correct to say that the summons in chambers (encl 9) simpliciter, (without form 16), constitutes a notice within the meaning of r 117.

Even if the summons were filed together with form 16 on 26 June 2000, the preliminary objection of the respondent would be unsustainable. The learned counsel for the appellant was correct in that the respondent had waived its right. It is inequitable for the respondent to insist on its right when at the first instant the respondent had acted by the exchange of affidavits with the appellant in a manner which indicated that he had waived his right.

The doctrine of waiver as enunciated by Lord Denning in *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 (CA) is as follows:

> The principle of waiver is as simple as this: if one party, by his conduct, leads another to believe that the strict rights under the contract will not be insisted on, intending that the other party should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so.
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> See *Plasticmoda Societa Per Azioni v Davidson (M) Ltd* [1952] 1 Lloyd's Rep 527.
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> There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His rights are at any rate suspended as long as the waiver lasts. He may, on occasion, be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them. See *Tool Metal Manufacturing Co Ltd v Tunsten Electric* [1955] 2 All ER 157. But there are cases where one withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party, in that he is bound by that waiver. He will not be allowed to his strict right. He can only enforce them subject to the waiver he has made.

See *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 663.

In *Crane v Colonial Mutual Fire Insurance* [1920] 1 CLR 305, the court held that:

> … We are bound here to limit the word 'waiver' to its own legal connotation. A waiver must be an intentional act with knowledge — per Lord Chelmsford LC.

ln *Earl of Darnley v (Proprietors) of London, Chatham & Dover Railway* (1867) LR 2HL 43 it was stated thus:

> First, 'some distinct act ought to be done to constitute a waiver'— per Parke B in *Doe d Nash v Birch* (1836) 1 M & W 402 at p 406 and — per William J in *Perry v Davis* (1858) 3 CB NS 769. Next, it must be 'intentional', that is, such either expressly or by imputation of law indicates intention to treat the matter as if the condition did not exist or as if the forfeiture or breach of condition had not occurred. Lastly, it must be 'with knowledge', an essential supported by many authorities, from *Pennent's* case (1596) 2 Co Rep 171 at p 173 and down to *Mathews v Smallwood* [1910] 1 Ch 777.

James LJ in *Pilcher v Rawlins* (1872) 2 Ch App 256 said (at p 268):

> 'Waiver' is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions. It is a conclusion of the law when the necessary facts are established. It looks, however, chiefly to the conduct and the position of the person who is said to have waived, in order to see whether he has approached so as to prevent reprobating — in English terms, whether he has elected to get some advantage to which he should not otherwise have been entitled, so as to deny him a later election to the contrary (see Lord Shah in *Pitman v Crum Ewing* [1911] AC 217 at p 239. His knowledge is necessary or he cannot be said to have approbated or elected.

In the instant case, when the appellant filed the summons in chambers there were exchanges of affidavits regarding the subject matter, and by these actions the respondent had clearly indicated that it had waived its right to raise an objection. It was intentional or within its knowledge that he had waived its right. The appellant had believed and acted in the knowledge that the respondent had by its conduct waived its rights. So when the respondent filed his preliminary objection, he was precluded by the doctrine of waiver — as he cannot approbate and reprobate at the same time.

Thus the appellant's form 16 does not offend r 117 nor s 3(2) of the Act. In the circumstances, I would allow the appeal with costs to the appellant.

Appeal allowed with costs.

Reported by Wong Ee Lynn